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APR 16 2002

In re Application of	:	OFFICE OF PETITIONS
David A. Jackson et al	:	
Application No. 09/840,924	:	DECISION DISMISSING PETITION
Filed: April 25, 2001	:	UNDER 37 CFR 1.137(f)
Attorney Docket No. 10473-670	:	

This is a decision on the petition filed March 29, 2002, to revive the instant nonprovisional application under the unintentional provisions of 37 CFR 1.137(f).

The petition is dismissed.

A request for reconsideration of this decision must be filed within TWO MONTHS from the mail date of this decision. Extensions of time pursuant to the provisions of 37 CFR 1.136(a) are available.

Petitioner states that, on April 25, 2001, a foreign application was filed corresponding to the above-identified application; however, applicants unintentionally failed to file a request to rescind the previously filed nonpublication request within the 45 day period following the filing thereof.

A petition under 37 CFR 1.137(f) must be accompanied by: (1) the reply which is met by the notification of such filing in a foreign country or under a multinational treaty;<sup>1</sup> (2) the petition fee as set forth in 37 CFR 1.17(m); and (3) a statement that the entire delay in filing the required reply from the due date of the reply until the filing of a grantable petition was unintentional.

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<sup>1</sup> The filing of a petition under this section will not relieve applicant of his obligation to reply to any outstanding Office action.

The Commissioner may require additional information where there is a question whether the delay was unintentional.

The record discloses that, on April 25, 2001, the date of filing of the instant application, a Request and Certification under 35 USC 122(b)(2)(B)(i) was filed certifying that "the invention disclosed in the attached **application has not and will not** be the subject of an application filed in another country, or under a multilateral agreement, that requires publication at 18 months after filing."

Petitioner now requests that this application be revived as having been unintentionally abandoned for failure to notify the Office within 45 days of the filing of a foreign or international application, which foreign application was filed on April 25, 2001.

35 USC 122(b)(2)(B)(iii) states:

An applicant who has made a request under clause (i) but who subsequently files, in a foreign country or under a multilateral international agreement specified in clause (i), an application directed to the invention disclosed in the application filed in the Patent and Trademark Office, shall notify the Director of such filing not later than 45 days after the date of the filing of such foreign or international application. A failure of the applicant to provide such notice within the prescribed period shall result in the application being regarded as abandoned, unless it is shown to the satisfaction of the Director that the delay in submitting the notice was unintentional [emphasis supplied].

The facts of this case are that the subject application was filed on April 25, 2001 and the foreign or international application was also filed on April 25, 2001. The statute does not provide for the situation where a certification under 35 USC 122(b)(2)(B)(i) was made on the same date, despite the fact that an application was filed in another country or under the multilateral international agreement. In view of petitioner's statement that the foreign

application was filed on April 25, 2001, the same date as the filing of the subject application, the filing of the foreign application cannot be considered to have been filed **subsequent** to the filing of the subject application in the United States. The statute at 35 USC 122(b)(2)(B)(iii) only provides for revival in the situation where a certification was made under 35 USC 122(b)(2)(B)(i) at the time of filing the application and an application was **subsequently** filed in a foreign country without notifying the Office within 45 days of the filing thereof.

Since the foreign or international application was either filed on the same date or filed prior to the filing date (this would be true if the foreign or international application has a filing date of April 25, 2001) as the subject application, this application did not become abandoned pursuant to the provisions of 35 USC 122(b)(2)(B)(iii). Therefore, a petition to revive pursuant to the provisions of 37 CFR 1.137(f) is inappropriate and, consequently, must be dismissed.

The previously filed nonpublication request has been rescinded. A corrected filing receipt which reflects the projected publication date of July 25, 2002 accompanies this decision on petition.

The rules and statutory provisions governing the operations of the U.S. Patent and Trademark Office require payment of a fee on filing each petition. 35 USC 41(c)(7). Accordingly, the \$1,280 petition fee submitted was due at the time of payment thereof and is not refundable.

This application is being forwarded to Technology Center 3600, Art Unit 3661, for examination in due course.

Further correspondence with respect to this matter should be addressed as follows:

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Any questions concerning this matter may be directed to the undersigned at  
(703) 305-8680.



Frances Hicks

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